VIRGINIA LAW REGISTER.

VOL. I.] APRIL, 1896. [No. 12.

GIFTS OF PERSONALTY.

"A gift may be defined as a voluntary transfer of his property by one to another without any consideration or compensation therefor." *Gray v. Barton*, 55 N. Y. 68, 72 (14 Am. Rep. 181), *per* Grover, J.; *Ingram v. Colgan*, 106 Calif. 113 (46 Am. St. Rep. 221)

It is essential to the legal idea of a gift that there should be an absence of consideration. In the language of Schouler (2 Schoul. Pers. Prop. (2d ed.), sec. 56: "When no pecuniary consideration passes back as an understood part of the transaction, nor any service is performed by way of an understood equivalent, the transaction, viewed from a legal standpoint, can hardly be otherwise than a gift." A *motive* may exist, founded perhaps on self interest, for what assumes the form of a gift; but to call it on that account *bargain and sale* would, to quote again from Schouler, "insult the parties." In the language of Kent (2 Kent's Com. 438): "The English law does not consider a gift, strictly speaking, in the light of a contract, because it is voluntary and without consideration; whereas a contract is defined (2 Bl. Com. 442) to be 'an agreement, on sufficient consideration, to do or not to do a particular thing.' And yet every gift which is made perfect by delivery, and every grant, are executed contracts; for they are founded on the mutual consent of the parties, in reference to a rig or interest passing between them." And in *Spooner's Adm'r v. Hilbish's Ex'r* (Va.), 23 S. E. Rep. 751, it is said by Riely, J.: "A gift is a contract without a consideration, and to be valid must be executed. A valid gift is therefore a contract executed." See to the same effect *Grover v. Grover*, 24 Pick. (Mass.) 261 (35 Am. Dec. 319); 2 Schoul. Pers. Prop., sec. 57, where it is contended that gifts are to be classed with contracts because they are founded on agreement.

I. GIFTS INTER VIVOS.

"Gifts *inter vivos*, or simple gifts, are such as one party makes to another without the expectation of approaching death as the moving

cause." 2 Schoul. Pers. Prop., sec. 64; *Dickeschied v. Bank*, 28 W. Va., 340, 359; 3 Redfield on Wills (2d ed.), p. 347, where the author defines and contrasts (1) gifts *inter vivos*, (2) gifts *causa mortis*, and (3) testamentary dispositions. It will suffice for our purpose to say that a gift *inter vivos* is not made *causa mortis;* that it is subject to no conditions implied by law; that the title vests in the donee *in præsenti*, and not after the death of the donor; and that when properly executed it is irrevocable and binding on both donor and donee. *Williamson v. Johnson*, 62 Vt. 378 (22 Am. St. Rep. 117).

As to the execution of gifts *inter vivos*, it is well settled that while a gift remains *executory*, it is unenforceable. For *ex vi termini* there is a lack of consideration for the donor's promise; and to hold it legally binding would violate the maxim *ex nudo pacto non oritur actio.* Hence it is essential to the validity of a gift that it should be *executed; i. e.*, the donor must have done what amounts in law to an *actual* gift; and his promise to give, without more, however formally accepted by the intended donee, is merely an inchoate gift, the gift still remains *in fieri*, and is "nothing in law." It becomes, therefore, necessary to understand clearly the legal idea of an *executed* gift. It is essential at law, at least in the absence of a deed of gift, that *delivery*, actual or constructive, be made of the subject-matter of a gift. It is said that by the old common law delivery was always required in order to pass title, whether to lands or chattels, whether by sale or by gift; and we are told that in Bracton's day the lawyers applied the term *seisin* "as freely to a pig's ham as to a manor or field." See *Cochrane v. Moore*, (Eng. Ct. of App.), 25 Q. B. Div. 75. As to lands, deeds operating under the Statute of Uses dispensed with livery of seisin, and now by statute in England and Virginia, lands "lie in grant;" as to sales of chattels, the doctrine has become established that the agreement to sell and buy a specific chattel, ready for present delivery, is both a *contract* and a *conveyance*, and title passes at once to the buyer, in the absence of a contrary intent, without any delivery of the chattel to the buyer. But as to *gifts* of chattels, the old law has persisted that mere words of promise and acceptance are insufficient, though a *deed of gift* would be effectual, without delivery of the chattels, to pass title to the donee; not because the delivery of the deed is a symbolical delivery of the chattels, but on the principle of estoppel. See *Connor v. Trawick's Adm'r*, 37 Ala. 289 (79 Am. Dec. 58); Williams Pers. Prop. 38; 2 Schoul. Pers. Prop., sec. 88. Thus in *Irons v. Smallpiece*, 2 B. & Ald. 551, the Chief Justice said: "I am of opinion that by the law of England,

in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee." And though some later English cases impugned the accuracy of *Irons v. Smallpiece*, and it was intimated that "after the acceptance of a gift by parol, the title is in the donee, without any actual delivery of the chattel," yet the law of England is probably settled by the decision of the Court of Appeal, in 1890, in *Cochrane v. Moore*, *supra*, which affirmed the doctrine laid down, in 1819, in *Irons v. Smallpiece*, except that the use of the word "instrument," as contrasted with a *deed*, was disapproved, unless by "instrument" a *will* was intended.

In the United States, the law is in accord with *Irons v. Smallpiece* and *Cochrane v. Moore*, 8 Am. & Eng. Enc. of Law, p. 1314, note 1. And see *Young v. Young*, 80 N. Y. 422 (36 Am. Rep. 634), where it is said: "It is impossible to sustain this as an executed gift without abrogating the rule that delivery is essential to gifts of chattels *inter vivos*. It is an elementary rule that such a gift cannot be made to take effect in possession *in futuro*. Such a transaction amounts only to a promise to make a gift, which is *nudum pactum*. There must be delivery of possession with a view to pass a present right of property." And in *Ewing v. Ewing*, 2 Leigh (Va.), 337, the gift of a bond (*inter vivos*) by the creditor to the debtor was held void for want of delivery, and the court expressly approved the doctrine of *Irons v. Smallpiece*, that a parol gift of a chattel, without any actual delivery, does not pass the title to the donee, and declared the law the same whether the gift was *inter vivos* or *causa mortis*. See, also, *Spooner's Adm'r v. Hilbish's Ex'or* (Va.), 23 S. E. Rep. 751.

It is held, however, that if a chattel be already in the possession of the donee, as the donor's bailee or agent, a gift *inter vivos* may be made of such chattel to the bailee or agent, by suitable words of gift, and retention of possession by the custodian *as owner*, without a return to the donor and redelivery by him. See 2 Schoul. Pers. Prop., sec. 70; *Wing v. Merchant*, 58 Me. 383; *Miller v. Neff*, 33 W. Va. 197, 206; 8 Am. & Eng. Enc. of Law, p. 1315, notes 3 and 4. And see *Carradine v. Carradine*, 58 Miss. 286 (38 Am. Rep. 324), where it is said: "Delivery of personal property is essential to a gift, whether *inter vivos* or *causa mortis*, but it is not essential in either case that it should be simultaneous with the words of donation. It may either precede or succeed the words. If it precede the words, so that the property is already in the possession of the donee, no new delivery is

necessary; if it succeeds the words, it makes perfect that which was before inchoate." But as to gifts *causa mortis*, the better opinion is that a previous possession as bailee is insufficient without new delivery; and it has been so held in Virginia and in other States. See *infra* under "*Gifts Causa Mortis.*"

We have now seen that at law delivery is essential to a gift *inter vivos*, unless a deed of gift be employed. But this delivery may be either *actual* or *constructive*. It is actual when possession is given by manual tradition of the subject of the gift; constructive when only the *means of obtaining* actual possession are delivered. Constructive delivery, thus defined, must be distinguished from what may be called *symbolical* delivery, *i. e.*, the delivery of one thing as the mere symbol of another, and not as the means of obtaining possession. Thus "the delivery of sixpence in the name of the thing given" is symbolical delivery; but the delivery of a key to a trunk or warehouse is constructive delivery. *Ward v. Turner*, 2 Ves. Sr., 431, 443. It is said that constructive delivery—a delivery of the means of obtaining possession—is always sufficient, when actual delivery is either impracticable or inconvenient. Thus in *Elam v. Keen*, 4 Leigh (Va.) 333, the owner of a bond had placed it in the hands of an attorney for collection by suit, and held the attorney's receipt for it. Suit had been brought upon it, and it had been filed among the papers of the cause. The owner made a gift of the bond, and delivered the attorney's receipt to the donee. It was held that the delivery of the receipt was equivalent to the delivery of the bond and the money secured by it. For a similar case, see *Stephenson v. King*, 81 Ky. 425 (50 Am. Rep. 173). And in *Hillebrant v. Brewer*, 6 Texas 45 (55 Am. Dec. 757), it was held that where a donor branded his cattle with the name of the donee, who was his infant daughter living with him, and recorded the brand, these acts constituted such a constructive delivery as was equivalent to an actual delivery, and afforded as satisfactory evidence of an intention to part with the dominion and ownership of the property as the nature of the case admitted of. And the law as to constructive delivery is the same, it seems, whether the gift be *causa mortis* or *inter vivos*. See *Stephenson v. King, supra; Thomas' Adm'r v. Lewis*, 89 Va. 1, 62; *Crook v. Bank*, 83 Wisc. 31 (35 Am. St. Rep. 17).

At this point it is important to consider the Virginia statute concerning gifts *inter vivos*. It is now to be found in Code of 1887, sec. 2414, and is as follows: "No gift of any goods or chattels shall be valid unless by deed or will, or unless actual possession shall have come to

and remained with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section." This statute underwent elaborate examination in the recent case of *Thomas' Adm'r v. Lewis*, 89 Va. 1 (37 Am. St. Rep. 848), where a gift *causa mortis* was made by Wm. A. Thomas to his natural daughter Bettie (a mulatto), and the delivery relied on was *constructive* (delivery of the keys to receptacles), and the objection was made that donor and donee *resided together*, and that the only possession was "at the place of their residence." But the gift *causa mortis* was sustained on common law principles, the court holding that the statute had no application, on the ground that the word "gift" in Code of Virginia, sec. 2414, *supra*, means a gift *inter vivos* only, and does not refer to nor include a gift *causa mortis*. Lacy, J., dissented.

The statute being disposed of on this ground, it was not necessary for the court to pass on a point vigorously contended for by Judge Burks, in his brief as counsel for Bettie Thomas Lewis (the donee), viz., that in sec. 2414 of the Code (as in other Virginia statutes) the words "goods or chattels" mean *corporeal* personalty, and do not embrace incorporeal personalty--*choses in action*—such as stocks, bonds, and notes, which were the subjects of gift in *Thomas' Adm'r v. Lewis*. Nor was this point adverted to by Judge Lacy in his dissenting opinion. It will, however, be of vital importance when a case shall arise of a gift *inter vivos* of bonds, notes, &c., if the donor and donee reside together, and the donee's possession is at the place of their residence. In *Dickeschied v. Bank*, 28 West Va. 340, there is a *dictum* to the effect that the West Virginia statute (Code W. Va. ch. 71, sec. 1), which is identical with that in Virginia, includes incorporeal personalty, the court saying (p. 368): "We are of opinion that the words 'goods or chattels' in that section include money and every other kind of personal property which may be the subject of a gift *inter vivos* or *causa mortis*." But in *Dickeschied v. Bank*, the gift was *inter vivos*, and of silver coin; so that it was unnecessary for the court to decide either as to the meaning of the word "gift" (as embracing gifts *causa mortis* as well as gifts *inter vivos*), or as to the meaning of "goods or chattels" (as embracing incorporeal personalty as well as corporeal). For comment on the case, see *Thomas' Adm'r v. Lewis*, 89 Va. p. 25 (argument of counsel for Thomas' adm'r) and p. 75 (dissenting opinion of Judge Lacy).

One other question arises under the Virginia statute. The language of section 2414 is: "No gift of any goods or chattels shall be valid unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him." Does this exclude altogether such *constructive delivery* as we have considered above? Take a case to which the statute is certainly applicable, that of a gift *inter vivos* of corporeal chattels, can delivery no longer be made in Virginia by handing over the *key* to a trunk or warehouse, with suitable words of gift? This point was raised by counsel in *Thomas' Adm'r v. Lewis, supra*, and it was contended (89 Va. p. 32) that under sec. 2414, the delivery must be actual and not constructive. And see the same view taken by Judge Lacy in his dissenting opinion (89 Va. p. 73). It is possible, however, that it would be held that the requirement of "actual possession" would be satisfied by such *potential* possession as results from constructive delivery, *i. e.*, the delivery of the means of obtaining possession. Until 1850 the Virginia statute included slaves only, as to which constructive delivery was hardly applicable; and when by the revision of 1849 the words "goods or chattels" were added, it is probable that the question whether actual *possession* could result from a constructive *delivery* was not raised or considered by the legislature.

Returning now to the subject of gifts considered executed at law, with especial reference to the donor's *incorporeal* personalty, it is manifest that if a negotiable instrument, payable to bearer, such as notes, coupon bonds, bills of exchange, checks, &c., made or drawn by third persons, be delivered by the donor to the donee with the gift intent, it is good as a gift *inter vivos*. For the legal title passes to the donee by such delivery, and he can sue on the instrument in his own name. See 2 Schoul. Pers. Prop., sec. 72. And the same would of course be true of a negotiable bill or note payable to the *donor's order*, and duly endorsed and delivered to the donee; for here, too, the legal title passes. But what is the law when the instrument is not negotiable, as a common bond, not coupon; or though negotiable, is payable to the donor's order, and is delivered by him to the donee without endorsement, in which case no *legal* title passes, but only an *equitable* title, which at common law the assignee (donee) must enforce by suing in the name of the assignor (donor). It has been argued that in these cases the gift is invalid; but the law is now settled in favor of its validity. Thus in *Grover v. Grover*, 24 Pick. 261 (Mass.), (35 Am. Dec. 319), it is said: "As a good and effectual assignment of a *chose*

in action, may be made by parol, and as courts of law take notice of and give effect to such assignments, there seems to be no foundation for this objection. It is true that the cases, which are numerous, where such equitable assignments have been supported, are founded on assignments for a valuable consideration; but there is little, if any, distinction in this respect between contracts and gifts *inter vivos;* the latter, indeed, when made perfect by the delivery of the thing given, are executed contracts." And in *Basket v. Hassell*, 107 U. S. 602, 614, it is held that it is sufficient if an equitable title passes to the donee. The instrument in that case was a certificate of deposit, and the court says: "A certificate of deposit is a subsisting *chose in action*, and represents the fund it describes, as in case of notes, bonds, and other securities; so that a delivery of it as a gift constitutes an equitable assignment of the money for which it calls."

In Darlington on Pers. Prop., p. 62, the law as to equitable assignments is thus laid down: "An equitable assignment is a transfer, either gratuitous or on consideration, which vests in the donee or purchaser an equitable title merely, without a transfer of the legal title, enabling him to sue, if suit be necessary to realize the benefit of the transaction, not in his own name, but in the name of the assignor to the use of the assignee. And it is now well settled that *choses in action* not negotiable, and negotiable paper not endorsed, may be the subject of such equitable assignment by way of gift, enabling the donee to sue in the name of the donor or his administrator to his own use, not only without the consent of the latter, but even when the administrator appears and protests against it, and although the donee after the delivery returned the *chose* for safe-keeping to the donor, who died with it in his possession. And the gift of an unindorsed negotiable note carries a collateral mortgage with it."

The doctrine of equitable assignments as applied to *choses in action* is undoubtedly a relaxation of the strict rule of *delivery* as applied to corporeal chattels, and as originally applied to incorporeal personalty (and by some cases still to corporation stock), which required the *fullest delivery of which the subject matter was capable*, and that the legal title should pass to the donee, if such title was in the donor. But in the case of a common bond, no legal title can in any way be made to pass to the assignee; and to have insisted on the transfer of the legal title to the donee would have made the gift of a bond impossible. In the case of a negotiable note payable to the donor's order, there is no such impossibility, for the payee (donor) can transfer legal

title by endorsement and delivery; but a gift of such note by delivery without endorsement, whereby only an equitable title passes to the donee, is sustained as an equitable assignment, by analogy, perhaps, to the case of the bond. And it would seem that on the same principle the delivery of bank or other corporate stock to the donee, with intent to transfer title by way of gift, should be effectual as an equitable assignment, although no legal title passes for want of a transfer on the books of the corporation. But the contrary has been held in a number of cases, and the courts of some States seem reluctant to extend the doctrine of equitable assignment to stocks. Thus it has been held that a certificate of bank stock, transferable in terms at the bank only, personally or by attorney, is not fully bestowed as a gift when delivered endorsed in blank by the donor; nor indeed sufficiently to entitle the donee to a transfer of the stock as against the donor's executor. *Pennington v. Gittings*, 2 Gill & J. 208; 2 Schoul. Pers. Prop. sec. 73. And in *Baltimore Retort &c. Co. v. Mali*, 65 Md. 93 (57 Am. Rep. 304) it is held that a gift of corporate stock *inter vivos* is not complete without a transfer on the books of the corporation, and that equity will not compel a transfer by the corporation, following *Pennington v. Gittings, supra.* But that a gift of stock by way of equitable assignment is valid is held in *Reed v. Copeland*, 50 Conn. 472 (47 Am. Rep. 663), and in *Grymes v. Hone*, 49 N. Y. 17 (10 Am. Rep. 313) (a case of gift *causa mortis*). And in *Thomas' Adm'r v. Lewis*, 89 Va. 1, a gift *causa mortis* of stock, the certificates being in a box together with bonds and notes, was sustained on a transfer to the donee of the key to the box, and no distinction was suggested between the several kinds of *choses in action.*

It remains to consider a mode of making a gift with the aid of a court of chancery which is in direct violation of the rule which declares that delivery is essential to a valid gift of chattels. This is a gift by way of a *declaration of trust*, of which there are many examples in the decided cases. In equitable assignments, although the legal title does not pass, there is still a *delivery* to the donee of the bond, note, stock, or other *chose in action.* But when a gift is made by way of a declaration of trust, the donor does not part with the possession of the subject-matter of gift; but retaining it, declares that he holds it *in trust* for the donee. See *Milroy v. Lord*, 4 DeGex. F. & J. 264. In *Richards v. Delbridge*, L. R. 18 Eq. 11, it is said by Jessell, M. R.: "The legal owner of the property may by one or other of the modes recognized as amounting to a valid declaration of trust, constitute him-

self a trustee, and without an actual transfer of the legal title, may so deal with the property as to deprive himself of the beneficial ownership, and declare that he will hold it from that time forward in trust for the other person. It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning." And in the same case it is said that the words, "I undertake to hold this bond for you," would undoubtedly amount to a declaration of a trust. And in *Martin v. Funk*, 75 N. Y. 134 (31 Am. Rep. 446), the donor deposited in a savings bank money belonging to her, declaring that she wanted the account to be for the donees, who were her distant relatives. The account was so entered in the donor's name *in trust for the donees;* and a pass-book to the same effect was given to the donor. She retained the pass-book until her death; and, having control of the fund, drew out one year's interest. The donees did not know of the deposit until after the donor's death. *Held,* that the transaction amounted to a valid declaration of trust. The court said: "In form, at least, the title to the money was changed from the intestate [the donor] individually to her as trustee. She stated to the bank that she desired the money to be thus deposited. It was so done by her direction, and she took a voucher to herself in trust for the plaintiff [one of the donees]. Upon these facts what other intent can be imputed to the intestate than such as her acts and declarations imported; and did they not import a trust? . . . The money was deposited unqualifiedly and absolutely in trust. And the intestate was the trustee. It would hardly have been stronger had she written in the pass-book, 'I hereby declare that I have deposited this money for the benefit of the plaintiff, and hold the same as trustee for her.'" But it is also held in New York that where A deposits his money in a *savings bank* in the name of B, and A receives the pass-book which gives him the control of the fund, and A makes no declaration of trust at the time of the deposit, and retains the pass-book, the transaction cannot be considered a gift, either by way of trust or delivery. *Beaver v. Beaver*, 117 N. Y. 421 (15 Am. St. Rep. 531). For a collection of the cases concerning gifts by the deposit of money in bank, see 8 Eng. & Am. Enc. of Law, p. 1326, n. 3.

We have now seen that a gift may be valid by way of equitable assignment, and also by way of declaration of trust—the donor declaring himself trustee. But it sometimes happens that a donor, with a gift intent, neither declares himself trustee nor makes an *effectual*

equitable assignment, though his *purpose* is evidently to *assign*, and not to create a trust. The question then arises, can the defective assignment be treated as tantamount to a declaration of trust, and the gift sustained on that theory? Some of the earlier English cases are in favor of this view, but they are now discredited, and the doctrine is that an abortive assignment will not (contrary to the intent of the donor) be converted into an implied declaration of trust, in order to save the gift from failure. It is said by Jessell, M. R., in *Richards v. Delbridge*, L. R. 18 Eq. 11: "However anxious the court may be to carry out a man's intention [*i. e.*, to make a gift] it is not at liberty to construe words otherwise than according to their proper meaning." And in *Moore v. Moore*, L. R. 18 Eq. 474, it is said by Hall, V. C.: "I do think it very important to keep a clear and definite distinction between cases of imperfect gift and cases of declaration of trust; and that we should not extend, beyond what the authorities have already established, declarations of trust so as to supplement and supply what, according to decisions of the highest authority, would otherwise be imperfect gifts." In other words, a donor is legally *put to his election* whether he will *assign* or *declare a trust;* and if he elects the former, as is shown by his attempted assignment, the gift must stand or fall as the donor designed to make it; and if ineffectual as an assignment, it can derive no assistance from the doctrine of declarations of trust. Otherwise, it has been said, "there would never be a case where an expression of present gift would not amount to a declaration of trust, which would be carrying the doctrine too far." *Per* Jessell, M. R., 18 Eq. Cas. 15. Thus if a father should place a bond in an envelope, and endorse thereon that it belonged to his son, and show the envelope to his son's wife, stating that he believes that he has made a valid disposition of the bond, but never delivers the bond to the son, the gift fails as *a trust*, for none was intended, and also as an *equitable assignment*, for want of delivery of the bond to the donee. See *Young v. Young*, 80 N. Y. 422 (36 Am. Rep. 634); *Lewis v. Mason*, 84 Va. 731; *Estate of Smith*, 144 Pa. St. 428 (27 Am. St. Rep. 641). Such a transaction could only be sustained if founded on a *valuable* consideration. For equity will not interpose to perfect a *defective* gift or voluntary settlement made without consideration. For further discussion of this subject see extended note to *Williamson v. Yager*, 91 Ky. 282, in 34 Am. St. Rep. 184. In this note, which contains the most elaborate discussion of voluntary trusts to be found in the books, the severity of the law in refusing to convert an imperfect equitable assignment into

a declaration of trust is deplored. And see article entitled "The Inconsistencies of the Laws of Gifts," *American Law Review*, May-June, 1895, p. 361.

In concluding the subject of the execution of gifts *inter vivos*, it may be well to say that when the donor signs and delivers a note to the donee in which he promises to pay money, this is no delivery of the money, but a mere unenforceable promise for lack of consideration. So if the donor writes and signs a check for money, and delivers it as a gift of so much money in bank, this is invalid as a gift, unless the check has been cashed or accepted by the bank before the donor dies. A voluntary *bond*, however, is good as a gift *inter vivos*, because its *form* dispenses with consideration, or as it used to be said, because the seal conclusively imports consideration; but though such bond may in fact constitute a gift, yet in legal intendment it is binding on the obligor as a *contract*, and should be classed, it has been said, with contracts and not with gifts. See Darl. Pers. Prop., p. 72; 8 Am. & Eng. Enc. of Law, p. 1321; Code Va., sec. 2660 and sec. 3301. And the above case of a note made by the donor is to be distinguished from a note made by a *third person* in the donor's favor, of which the donor is payee. This note of a third person is an existing *chose in action*—the property of the payee —and he can make a valid gift of it, as we have seen. And a gift can be made of such a note not merely to a third person but to the *maker* himself, the debt thus being extinguished by the creditor as a gift to his debtor. But it is well settled that no merely parol declaration will transform a debt into a gift. *In re Campbell's Estate*, 7 Pa. St. 100 (47 Am. Dec. 503). To make a gift by way of a forgiveness of a debt effectual, the donor must destroy the evidence of the debt where there is a writing, or surrender it to the debtor (donee), or give the debtor a release under seal; or as some cases hold, a receipt in full for the debt. See 2 Schoul. Pers. Prop., sec. 97; also sec. 186, note 9.

Thus in *Gray v. Barton*, 55 N. Y. 68 (14 Am. Rep. 181), the plaintiff had an account against the defendant for over $800, and proposed to give the defendant the debt; but the defendant said the gift would not stand in law. The plaintiff said that if the defendant would give him a dollar, that would make it lawful; and then proposed if the defendant would give him a dollar he would give the defendant the entire debt. Thereupon the defendant did give the plaintiff a dollar, which the plaintiff accepted, and balanced his books as follows:

"Wm. Barton, Cr. by cash on account.....$ 1.00
Gift, to balance account.....$820.91."

Furthermore, the plaintiff, for the purpose of carrying out the arrangement, gave the defendant a receipt as follows: "Received of Wm. Barton one dollar, in full to balance all book accounts up to date, of whatever name and nature." It was held (1) that the payment by the debtor of $1.00 in discharge of $821.91 was inoperative as an accord and satisfaction, on the familiar principle that "the payment of a smaller sum in satisfaction of a larger is no discharge of the debt, as it is doing no more than a man is already bound to do, and is no consideration for a promise express or implied to forego the residue of the debt." See Anson on Contracts (4th ed.), p. 83. (This rule of the common law is now, however, altered in Virginia by a statute taking effect May 1st, 1888, which declares (Code, sec. 2858): "Part performance of an obligation, promise, or undertaking, either before or after breach thereof, when expressly accepted by the creditor in satisfaction, and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise, or undertaking.") It was held (2) that the plaintiff's balancing his books by way of gift to the defendant was inoperative, because nothing was *delivered* to the defendant, and the books continuing in the possession of the plaintiff (the donor), the gift was not executed. But it was held (3) that when, to complete his purpose of giving the debt, he executed and delivered to the defendant a *receipt in full* for the account, the law would construe the instrument, if necessary, as an assignment of the account and the right of action thereon to the defendant, and thus the gift was valid. And see in accord, *Carpenter v. Soule*, 88 N. Y. 251. But while this may be the effect of a receipt in full by way of gift, the better way to extinguish a debt is to execute and deliver to the debtor a release under seal. In *Gray v. Barton, supra*, it is said by Grover, J.: "Although the reason why the use of a seal would effect a discharge, while the same writing not sealed would not produce such a result, is rarely alluded to, yet it is perfectly obvious; at common law the seal was conclusive evidence of sufficient consideration, and hence when attached to the release of a debt was conclusive of a sufficient consideration therefor."

II. Gifts Causa Mortis.

A gift *causa mortis* is defined by Schouler (2 Schoul. Pers. Prop., sec. 135) as "a gift of personal property made by a party in the expectation of death then imminent, and upon the essential condition that the property shall belong fully to the donee in case the donor dies as an-

ticipated, leaving the donee surviving him, and the gift is not meantime revoked, but not otherwise." But see *Ridden v. Thrall*, 125 N. Y. 572 (21 Am. St. Rep. 758), where it is held that the donor need not *die* from the anticipated peril, provided he does not *recover* therefrom; and that in such case a gift *causa mortis* takes effect, though the donor dies from a cause not contemplated by him at the time the gift was made.

In his able and learned brief in the great case of *Thomas' Adm'r v. Lewis*, 89 Va. 1, the following propositions are laid down by Judge Burks (counsel for the appellee) as now too well established to require the citation of authorities:

(1) "The gift must be of *personal* property. The property may be either corporeal—visible, tangible, movable—an object of the senses—or incorporeal, that is, rights in action; in technical legal phrase, *choses in action*. At first it was considered that the gift could be made of corporeal property only. It was afterwards extended to debts owing to the donor evidenced by negotiable instruments, the delivery of which passed the legal title to the donee, and subsequently to debts evidenced by instruments the delivery of which passed the *equitable*, though not the legal title, the holder of the legal title being regarded as the trustee for the equitable owner "

(2) "The gift must be made *in periculo mortis*—under the apprehension of death as imminent. The peril, however, need not be that which arises from mere physical disease. It is sufficient if it arises from any external cause. 'Such a donation,' says Pomeroy, 'may be made by a donor who anticipates his speedy death because he is suffering at the time under an attack of severe illness which he supposes to be his last, or because he is exposed, or expects to be exposed, to some great and unusual peril of his life, as by a soldier soon before entering into battle, or by a person soon before undergoing a dangerous surgical operation.' 3 Pom. Eq., sec. 1146." See, as to surgical operation, *Ridden v. Thrall*, 125 N. Y. 572 (21 Am. St. Rep. 758).

(3) "Possession of the property given must be delivered at the time of the gift to the donee or to some one for him, and the gift must be accepted by the donee. The gift may be in parol—no writing is necessary."

(4) "The title to the property must vest in the donee at the time of the gift. If it is not to vest at all until the death of the donor, it is said to be testamentary, and therefore ineffectual. But the title does not vest absolutely. If it does, it is not a gift *mortis causa*, but *inter*

vivos. It vests conditionally only; that is, it is defeasible by subsequent events. The donor may revoke the gift at his will and pleasure at any time during his life; and it will be defeated by operation of law if he escapes the peril which is the cause of the gift, or survives the donee. If, however, it is neither revoked nor defeated in the manner indicated, it becomes absolute at the donor's death, and not until then. Until the donor's death, the donee has but an inchoate, imperfect, defeasible interest."

From the above definition and description of a gift *causa mortis* (and indeed from its very name), it is seen that it differs from a gift *inter vivos* (or ordinary gift), in the fact that the apprehension of impending death is the *motive*, or moving cause, of the gift; and the law, which usually ignores *motive* as distinguished from intent, attaches such importance to motive in the case of these death-bed gifts, as they have been called, as to declare them revoked, *ipso facto*, if the donor *does not die* as he apprehended at the time of making the gift. (But see *Ridden v. Thrall, supra.*) The recovery, therefore, of the donor who has made the gift on what he supposed was his death-bed revokes the gift; and so when the soldier escapes the peril of battle, the sailor is rescued from shipwreck, or the felon is pardoned on the way to the scaffold; and by analogy to a legacy given by will, which *lapses* if the legatee dies in the lifetime of the testator, and which is revocable by the testator by a subsequent will or codicil, it is considered that a gift *causa mortis* is defeated if the donee does not survive the donor, and is revocable by the donor at his pleasure at any time before his death.

But it must not be supposed that every gift when the donor is on his death-bed, or otherwise near death, is necessarily and in all cases a gift *causa mortis;* for a gift *inter vivos,* absolute and irrevocable, can be made under these circumstances. For death may not be the moving cause of the gift, though it is *imminent,* and the donor is *conscious* of the fact. Thus, for example, suppose that on the donee's birthday the donor has been in the habit of presenting to the donee a sum of money, say a $20 gold piece, and that the donee's birthday finds the donor dying, who nevertheless delivers the gold piece to the donee as usual. This would undoubtedly be an absolute gift, not made *causa mortis.* See *Henschel v. Maurer,* 69 Wis. 576 (2 Am. St. Rep. 757), where it is said: "Where a gift of personal property is made to take effect immediately and irrevocably, and is fully executed by complete and unconditional delivery, it is certainly binding on the donor as a gift *inter vivos,* even if the donor is at the time *in extremis* and dies soon

after." But where a gift is made when death is apprehended and imminent, the *prima facie* presumption is that it is a gift *causa mortis*, and the burden is on those who deny that death was the moving cause to show from the words or acts of the donor, or the circumstances of the gift, that it was intended by the donor to be absolute and irrevocable, without reference to the death, in other words that it was a gift *inter vivos*. See 2 Schoul. Pers. Prop., sec. 156.

We have seen that a gift *causa mortis* is valid as to personal property only. In this respect it resembles a nuncupative (*i. e.*, verbal) will, which was never allowed of lands, but of goods and chattels only, and which even as to chattels is not now allowed in England and Virginia save in the case of "a soldier being in actual military service, or a mariner or seaman being at sea." See Code of Va., sec. 2516. And a gift *causa mortis* also resembles a will of chattels in its *revocable, ambulatory* character; and when it embraces the donor's whole personal estate the effect is the same as that of a will, and yet the gift *causa mortis* may be verbally made, while the will must be in writing, and in many States attested by at least two subscribing witnesses, as is the law of Virginia, unless the will be olograph. It is therefore possible by a gift *causa mortis* to evade the requirements of the Statute of Wills; and hence such gifts have been considered as opposed to public policy, and regret has been expressed that they were ever sanctioned by the law of England and America. See 2 Schoul. Pers. Prop., sec. 197-8. And from a conviction of the impolicy of gifts *causa mortis*, as opening a door for fraud and perjury, and from the feeling that they trench upon the Wills Acts, an effort has been made to set a limit to them by holding that a gift *causa mortis* of the whole of the donor's personal estate is in effect a will, and void unless there is a compliance with the statute of wills. See *Headley v. Kirby*, 18 Pa. St. 326; *Marshall v. Berry*, 13 Allen (Mass.) 43, 46; *Fearing v. Jones*, 149 Mass. 12 (14 Am. St. Rep. 392). But the contrary has been held in *Meach v. Meach*, 24 Vt. 591, and is now decided in Virginia in *Thomas' Adm'r v. Lewis*, 89 Va. 1, 65, where it is said: "By the law of Virginia a person may make a dying disposition of all of his personal property, *donatio mortis causa;* and there is no limit as to the extent of the gift—whether of the whole or of the part—*inter vivos* or *donatio mortis causa*. Such limitation can only be by express legislation, and the courts are invested with no such function."

But while a gift *causa mortis* resembles a legacy in that it is *revocable*, there is one respect in which it departs from a testamentary dispo-

sition, and comes under the law governing gifts *inter vivos*. This is in the requirement of *delivery* of the subject-matter of gifts by the donor to the donee; and the donee should take and retain possession until the donor's death. See *Hatch v. Atkinson*, 56 Me. 324 (96 Am. Dec. 464); *Dunbar v. Dunbar*, 80 Me. 152 (6 Am. St. Rep. 166). This change of possession the law demands as a requisite common to all gifts, and as affording in the case of gifts *causa mortis* some protection against fraud and perjury. For, in the language of Schouler (2 Schoul. Pers. Prop., sec. 184), "Fraud casts its most alluring looks towards a dying person's bedside, and tempts the bystander to lay hold of what he may before a probate court can take jurisdiction, and to appropriate on the plea that he who shall never return to claim his own had turned it over to him as a farewell gift." Hence, there are many cases where an alleged gift *causa mortis* has failed for want of a proper delivery by the donor to the donee; and while in the main the rules of law already discussed as to the execution of gifts *inter vivos* apply also to gifts *causa mortis*, there are several respects in which the law refuses to admit when the gift is *causa mortis* what it allows in favor of a gift *inter vivos*.

Thus, it is said by Schouler, that a deed of gift of chattels, without the delivery of the chattels themselves, is ineffectual for a gift *causa mortis*, on the ground that a deed of gift *inter vivos* is upheld by way of *estoppel* against the donor, whereas estoppel could hardly operate in the case of gifts *causa mortis* which the donor can revoke whenever he likes. 2 Schoul. Pers. Prop., sec. 179 and note 4. And in 8 Am. & Eng. Enc. of Law, p. 1350, the law is thus laid down: "An instrument in writing, or a deed of gift, although delivered, will not operate as a gift *causa mortis*. The delivery of the writing will not amount to a delivery of the property. Such a writing, if it could change the ownership of the property as a [gift] *causa mortis*, would amount practically to a will, without having the formalities required by law."

Again, we have seen that gifts *inter vivos* are good by way of declaration of trust; but this doctrine seems inapplicable to the gift of a dying man, who could hardly intend to make himself a trustee. But, see *Ellis v. Secor*, 31 Mich. 185 (18 Am. Rep. 178), a case which is severely criticised by Schouler. See 2 Schoul. Pers. Prop., sec. 175, n. 2; also sec. 179, note 4, at end.

The doctrine of constructive delivery applies, in general, alike to gifts *inter vivos* and *causa mortis;* but, by the weight of authority, the law is not the same as to the two classes of gifts when the donee has

had previous possession of the chattel as the donor's bailee. As to gifts *inter vivos*, it is settled that in this case no new delivery is necessary to turn the bailment into a gift; but if the gift is *causa mortis*, a number of courts refuse to allow this relaxation, and require that there shall be a redelivery by the donor by way of gift. Thus, in *Miller v. Jeffress*, 4 Gratt. 472, it was said by Baldwin, J.: "It is not the possession of the donee, but the *delivery* to him by the donor, which is material to a *donatio mortis causa*. . . . . The delivery must accompany and form part of the gift; an after-acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better." On this ground it was held that a gift by Paschal Folwkes to Edward Jeffress failed for want of a delivery, where Jeffress was in possession of bonds of Folwkes put into his hands for collection, and Folwkes on his death-bed said that "he wished his friend Edward T. Jeffress should have all the bonds of his in his possession." And see *Yancey v. Field*, 85 Va. 756, approving *Miller v. Jeffress*. And in the recent case of *Drew v. Hagerty*, 81 Me. 231 (10 Am. St. Rep. 255), it is held that a gift *causa mortis* of a savings bank book from a husband to his wife must, in order to be valid, be accompanied by actual delivery of the book by the donor to the donee, and such delivery must be made for the express purpose of consummating the gift. A previous and continuing possession by the donee is not sufficient.

The doctrine above stated that delivery is not dispensed with when a gift is *causa mortis*, although the donee is already in possession of the subject of the gift, is questioned by Schouler (2 Schoul. Pers. Prop., sec. 180), and there are some cases to the contrary. *Stevens v. Stevens*, 2 Hun. (N. Y.), 470; *Champney v. Blanchard*, 39 N. Y. 111. And see *Southerland v. Southerland*, 5 Bush. (Ky.), 591; *Carradine v. Carradine*, 58 Miss. 286 (38 Am. Rep. 324). But it is thus ably vindicated by the Supreme Court of Maine in *Drew v. Hagerty, supra:* "If the act of delivery was for no other purpose than to invest the donee with possession, no reason is perceived why it might not be dispensed with when the donee already had possession. But such is not its only purpose. It is essential, in order to distinguish a gift *causa mortis* from a legacy. . . . Delivery is also important as evidence of deliberation and intention. It is a test of sincerity, and distinguishes idle talk from serious purposes. And it makes fraud and perjury more difficult. . . . We are aware that some text-writers have assumed that where the property is already in the possession of

the donee, a delivery is not necessary. But the cases cited in support of the doctrine nearly all relate to gifts *inter vivos*, and not to gifts *causa mortis*. A gift *inter vivos* may be sustained without a distinct act of delivery at the time of the gift, if the property is then in the possession of the donee, and the gift is supported by long acquiescence of the donor, or other entirely satisfactory evidence. . . . But the question we are now considering is not whether a gift *inter vivos* can be sustained without a distinct act of delivery, but whether such a relaxation of the law can be allowed in the case of a gift *causa mortis*. We think not. Reason and the weight of authority are opposed to such a relaxation." See, in accord with *Miller v. Jeffress* and *Drew v. Hagerty*, *French v. Raymond*, 39 Vt. 623; *Cutting v. Gilman*, 41 N. H. 147; *Case v Dennison*, 9 R. I. 88 (11 Am. Rep. 222); *McCord v. McCord* 77 Mo. 166 (46 Am. Rep. 9). And see *Miller v. Neff*, 33 W. Va. 197, 206, suggesting, in case of previous possession by donee, differences between a gift *inter vivos* (which was the case before the court) and a gift *causa mortis*.

Another difference between gifts *inter vivos* and gifts *causa mortis* is in the case of a bond executed by the donor in favor of the donee. We saw that this was good as a gift *inter vivos*, the seal dispensing with consideration, and making the obligation binding at law on the donor. But a gift *causa mortis* is in its nature *revocable*, and never binding on the donor till death has set *its seal* thereon. How then can a bond be good as a gift *causa mortis*, when the donor can revoke it at pleasure, just as he can his promise when not under seal? See 2 Schoul. Pers. Prop., sec. 167. But as to bonds, notes, etc., signed by third persons in favor of the donor, and by him delivered to the donee, there is no difference between gifts *causa mortis* and gifts *inter vivos*. The delivery, however, to the donee, of a note made *causa mortis* by the donor in favor of the donee as payee, is inoperative, being without consideration and therefore giving no cause of action. And a check drawn by the donor, *causa mortis*, is of no effect unless cashed or accepted by the bank (the drawee) before the donor dies—the same doctrine we have seen to be applicable to the gift of a check drawn by the donor in favor of the donee (payee) as a gift *inter vivos*. See as to *note* made by donor, *Parish v. Stone*, 14 Pick. (Mass.) 198 (25 Am. Dec. 378); *Holley v. Adams*, 16 Vt. 206 (42 Am. Dec. 508). As to *check* drawn by donor, see *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Beak v. Beak*, 13 Id. 489; *Harris v. Clark*, 3 N. Y. 93 (51 Am. Dec. 352). See also 2 Schoul. Pers Prop., secs. 148-151, where the cases are discussed.

But when the donor gives a *chose in action* made by a *third person*, of which the donor is payee or assignee, then the remarks of Shaw, C. J., in *Parish v. Stone*, *supra*, after citing cases sustaining such gifts, are applicable: "These cases all go on the assumption that a bond, note, or other security is a valid, subsisting obligation [*i. e.*, of a third person in favor of the donor] for the payment of a sum of money; and the gift is in effect a gift of the *money*, by a gift and delivery of the instrument which shows its existence, and affords the means of reducing it to possession; all of which ingredients are wanting in his own note given by the donor to the donee, without consideration, which is a mere gratuitous promise." And in *Hewitt v. Kaye*, *supra*, where a dying woman drew a check at night as a gift *causa mortis*, and died during the same night, and before the check could be presented for payment, it was held that the gift was void. Said Lord Romilly, M. R.: "A check is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. . . . It is worth nothing until acted upon, and the authority to act upon it is withdrawn by the donor's death." The better view is that a check upon a bank account is not of itself an equitable assignment of the fund; and there is no privity between the payee and drawee (the bank) until the check is presented and accepted. See *Bank v. Millard*, 10 Wall. 152. But of course the above doctrine has no application when the check is that of a third person in favor of the donor, who delivers it as a gift *causa mortis*. Thus in *Burke v. Bishop*, 27 La. Ann. 465 (21 Am. Rep. 567), where the donor the day before he died delivered to the donee, with the intention of giving it to her, a bank check drawn by another to the donor's order, and endorsed by the donor in blank, it was held a valid gift *causa mortis*, though the check was not presented for payment until after the donor's death. The court said: "If it had been a check drawn by Hampton Elliott [the donor], and he had died before the check was presented, and the check was a donation, the check would have been worthless, because by the demise of the donor his mandate to his agent, the bank, was revoked. But the check in question was not of Hampton Elliott's drawing. It was a check drawn to his order. The moment he endorsed it, and handed it over to Mrs. Risley [the donee] his property in it ceased. It was not his money which the bank paid when it paid the check. It was Britton & Kountz's money [drawers of the check].

The bank paid under instructions from them, and not from any mandate from Elliott."

It has been seen that a valid gift *inter vivos* can be made by a creditor to his debtor by way of a *forgiveness* or *extinguishment* of the debt, and the several ways in which this may be done. The same doctrine applies to gifts *causa mortis*. See 2 Schoul. Pers. Prop., sec. 186. Thus in *Lee v. Boak*, 11 Gratt. 182, the donor held certain bonds on his nephew, and a short time before his death delivered them to his nephew to be cancelled and destroyed, declaring his purpose to discharge his nephew from their payment, and this was held to constitute a valid gift *causa mortis*. The court said: "A donation of a debt to the debtor himself is entitled to at least as much favor as a donation of a debt to a third person; and a delivery of the evidence of a debt is at least as valid a delivery of the debt itself in the former as in the latter case. The delivery of the evidence of the debt to a stranger-donee merely enables him to obtain possession of the subject of the gift; while such a delivery to the debtor-donee, *ipso facto* puts him in the possession of the subject, or converts to his own use that possession which he had hitherto held for the use of his creditor." And see *Gardner v. Gardner*, 22 Wendell (N. Y.), 526 (34 Am. Dec. 340), where it was held that where the donor destroyed a bond with the declared intent to forgive the debt, this constituted a valid gift of the debt. This, however, it seems, was a gift *inter vivos*, but the same rule applies to a gift *causa mortis*. And see further as to the execution of gifts *causa mortis*, note to *Bradley v. Hunt*, 5 Gill. & J. (Md.) 54 (23 Am. Dec. 597).

We shall conclude the discussion of gifts *causa mortis* with a consideration of the facts and decision in two important recent cases on the subject—*Basket v. Hassell*, 107 U. S. 602 (decided in 1882), and *Thomas' Adm'r v. Lewis*, 89 Va. 1 (decided in 1892).

BASKET v. HASSELL. This was a case of gift *causa mortis* of a certificate of deposit in the Evansville (Ind.) National Bank, which certificate was in these terms: "H. M. Chaney has deposited in this bank twenty-three thousand five hundred and fourteen 70-100 dollars, payable in current funds to the order of himself on the surrender of this certificate properly endorsed, with interest at six *per cent. per annum* if left for six months. HENRY REIS, Cashier." H. M. Chaney, during his last sickness, and in apprehension of death, wrote on the back of the certificate the following endorsement: "Pay to Martin Basket, of Henderson, Ky.; no one else; *then not till my death.* My

life seems to be uncertain. I may live through this spell. Then I will attend to it myself. H. M. CHANEY." Chaney then delivered the certificate to Basket, and died without recovering from the sickness. *Held*, void as a gift *causa mortis*. It was conceded by the court that a valid gift *causa mortis* could be made of a certificate of deposit (see quotation from *Basket v. Hassell* on this point, *supra*); and no difficulty was made as to the "apprehension of death then imminent," but the court decided against the donee (Basket) on the ground that the alleged gift was really a *testamentary disposition*, and that this was the consequence of the words in the endorsement, "then not till my death," which nullified what otherwise would have been the legal effect of the endorsement and delivery of the certificate, and as a mandate to the bank intercepted and prevented any control or constructive possession of the fund until after the donor's death. The court said (p. 615): "The endorsement which accompanied the delivery qualified it, and limited and restrained the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death. The property in the fund did not *presently* pass, but remained in the donor, and the donee was excluded from its possession and control during the life of the donor. . . . The right conferred upon the donee was that expressed in the endorsement, and that instead of being a transfer of the donor's title and interest in the fund as established by the terms of the certificate of deposit, was merely an order upon the bank to pay to the donee the money called for by the certificate upon the death of the donor. It was in substance not an assignment of the fund on deposit, but a check on the bank against a deposit, which, as is shown by all the authorities and upon the nature of the case, cannot be valid as a *donatio mortis causa*, even when it is payable *in præsenti*, unless paid or accepted *while the donor is alive;* how much less so when, as in the present case, it is made payable only "*upon his death.*" And it was added: "It cannot be said that the condition in the endorsement which forbade payment until the donor's death was merely the condition attached by law to every such gift. Because the condition which inheres in a gift *mortis causa* is a *subsequent* condition that the subject of the gift shall be returned if the gift fails by revocation; in the meantime the gift is executed, the title has vested, the dominion and control of the donor has [*sic*] passed to the donee. While here the condition annexed by the donor to his gift is a condition precedent, which must happen before it becomes a gift; and as the contingency contemplated is the donor's death, the gift cannot be

executed in his lifetime, and consequently can never take effect." See *Sterling v. Wilkinson*, 83 Va. 791. Also, *Miller v. Jeffress*, 4 Gratt. 472, opinion of Allen, J.; *Walter v. Ford*, 74 Mo. 195 (41 Am. Rep. 312).

(2) THOMAS' ADM'R v. LEWIS. This case has already been referred to as to the effect of section 2414 of the Code of Virginia. We saw that this section was held to have no application to a gift *causa mortis;* and the gift was sustained, with one exception, on the principles applicable to *causa mortis* gifts in the absence of any statutory regulation. The gift was made in 1889, by William A. Thomas, who resided near the city of Richmond, to his natural daughter Bettie, of personal property worth over $200,000. It consisted of debts due him, evidenced by bonds and notes, some oil which were secured by deeds of trust; stocks for which he held certificates; and a deposit of about $18,000 in bank, for which he held a pass-book. The bonds and notes, certificates of stock, etc., were in a safety deposit-box, in the vault of the Planters National Bank in Richmond, of which he had the use under an arrangement with the bank. In fact there were two boxes, each with a lock and key. There were two sets of keys to the two boxes, the inner and outer, and the two sets had been delivered to Thomas. He had also an iron safe at Drewry & Co.'s, in Richmond, in which he had deposited some articles of inconsiderable value. There were two keys also to the safe. The delivery made by Thomas to Bettie was by handing to her *one set* of keys to the vault and safe, declaring that he gave her their contents, and adjuring her to take good care of the keys.

Aside from the Virginia Statute (sec. 2414) it was contended by counsel for Thomas' estate that the gift was void: (1) Because it was all (or nearly all) the donor's personal estate. This objection was overruled, as we have seen. (2) Because the gift was really *testamentary;* it appearing that Thomas said to Bettie that the property was "*to be hers in case of his death.*" But the court distinguished the case from *Basket v. Hassell, supra,* and declared that numerous authorities established the principle that the words, accompanying a delivery to the donee, "in case of my death it is yours," or like words, do not of themselves make a *testamentary* disposition, but merely express the condition which the law annexes to every gift *causa mortis; i. e.,* a condition subsequent. See *Snellgrove v. Baily,* 13 Atkyns, 214. (3) Because the donor delivered *one set only* of the keys, and retained the duplicate keys; but this objection met with no favor from the court.

(4) Because the case was not one proper for constructive delivery by handing over *keys* in lieu of the property itself, and reliance was placed on the case of *Hatch v. Atkinson*, 56 Me. 324 (96 Am. Dec. 464), where it is said, "Although the delivery of a key of a warehouse or other place of deposit where *cumbrous* articles are kept may constitute a sufficient constructive or symbolical delivery of such articles, it is well settled that the delivery of a key to a trunk, chest, or box, in which valuable, articles are kept which are capable of being taken into the hand, and may be delivered by being passed from hand to hand, is not a valid delivery of such articles." And see in accord *Keepers v. Fidelity &c. Co.*, 56 N. J. Law 302 (44 Am. St. Rep. 397). But the Virginia court rejected this view of the law and declared: "Constructive delivery is always sufficient when actual manual delivery is either impracticable or inconvenient. The contents of a warehouse, trunk, box, or other depository may be sufficiently delivered by the delivery of the key of the receptacle." And see now *Goulding v. Horbury*, 85 Me. 227 (35 Am. St. R. 357) decided in 1892, where the Maine Supreme Court cite *Thomas' Adm'r v. Lewis*, and admit that the doctrine of *Hateh v. Atkinson*, *supra*, is more strict than that of some of the cases, but decline to depart from it.

It has been said above that the gift in *Thomas' Adm'r v. Lewis* was sustained with one exception. That exception was the pass-book representing a deposit of over $18,000 in the Planters National Bank. The court below held that the delivery of the pass-book could not operate as a gift of the deposit, but added that it considered the question "very doubtful." This decision was sustained by the Court of Appeals, but with no adequate discussion of the point. Judge Fauntleroy, who delivered the opinion of the court, held that the gift of the deposit was good, and dissented from his brethren on this point. The bank was not a savings bank, and the pass-book was not therefore such a voucher that, by special contract with the bank, the mere presentation of the book would authorize the bank to pay the deposit represented by it to the person presenting the book. It was an ordinary pass-book, but it had recently been written up by the bank showing a deposit of $18,000 to the credit of W. A. Thomas, who had since drawn one check only, for a small amount; and it was argued by Judge Burks that the "book was an acknowledgment of indebtedness from which the law implies a promise to pay," and he contended that the pass-book was equivalent to a receipt, and cited *Elam v. Keene*, 4 Leigh,

333, where a gift of a bond was made by the delivery of the attorney's receipt, as was seen above.

The decisions as to the delivery of pass-books are conflicting. See 2 Schoul. Pers. Prop., secs. 172–3, where he distinguishes between pass-books of savings banks and ordinary pass-books. And see *Ashbroook v. Ryon*, 2 Bush. (Ky.) 228 (92 Am. Dec. 481); *Stevenson v. King*, 81 Ky. 25 (50 Am. Rep. 172), criticising *Ashbrook v. Ryon; Sheedy v. Roach*, 124 Mass. 472 (26 Am. Rep. 680); *Pope v. Burlington Sav. Bk.*, 56 Vt. 284 (48 Am. Rep. 781); *Appeal of Walsh*, 122 Pa. St. 177 (9 Am. St. Rep. 83); *Drew v. Hagerty*, 81 Me. 231 (10 Am. St. Rep. 255 and note); *Ridden v. Thrall*, 125 N. Y. 572 (21 Am. St. Rep. 758); *Jones v. Weakley*, 99 Ala. 441 (42 Am. St. Rep. 84).

CHARLES A. GRAVES.

Washington and Lee University,
Lexington, Va.